No. 76-1587

In the Supreme Court of the United States

OCTOBER TERM, 1976

FEDERAL POWER COMMISSION, PETITIONER

v.

SOUTHLAND ROYALTY COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

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1. Southland claims that the Commission misstates the question presented. Specifically, Southland claims that the Commission asks whether gas which has been "dedicated to interstate commerce" can be "withdraw[n]" without abandonment authorization under Section 7(b) of the Natural Gas Act, 52 Stat. 824, 15 U.S.C. 717f(b); whereas, in Southland's view, the question is "whether Gulf had dedicated Southland Royalty's gas in the first place" (Br. in Opp. 6).

However, in so characterizing the Commission's formulation of the issue in the case, Southland ignores the "Question Presented" explicitly stated in the Commission's petition (Pet. 2). There the question is put in terms of whether the lessor under an expired lease may, without abandonment authorization, "withdraw gas from

interstate commerce after the lessee, during the lease term, had sold gas from the leaseholds in interstate commerce and had obtained from the Commission certificates of public convenience and necessity of unlimited duration authorizing that service." Manifestly, the question is whether the interstate sale of leasehold gas authorized by a Commission certificate creates a "service" that may not be discontinued without abandonment authorization. Southland, in putting the issue in terms of whether the gas had been dedicated "in the first place," merely restates the same question.

2. Southland cites *Meyers* v. *Famous Realty, Inc.*, 271 F. 2d 811 (C.A. 2), certiorari denied, 362 U.S. 910, for the proposition that under the Interstate Commerce Act "the regulated activities of a lessee do not subject a non-regulated lessor to the agency's jurisdiction" (Br. in Opp. 9-10). In that case, as Southland notes, the court refused to require the railroad lessor to continue the operation of a railroad line after termination of the lease. However, Southland neglects to note that the lessee in that case had previously been authorized by the Interstate Commerce Commission to abandon the service. 271 F. 2d at 813-814. On its facts, therefore, *Meyers* holds only that, where the lessee has previously been authorized to abandon the service, the non-operator lessor will not similarly be required to obtain abandonment authorization prior to termination of the same service. That holding is entirely consistent with the Commission's holding here (J.A. 611) that Gulf Oil Corporation, the lessee, despite the expiration of the lease, would be required to obtain abandonment authorization before abandoning the sales from the Crane County acreage. As explained in our petition (pp. 15-18), the principle of the railroad cases, including *Meyers*, is that, once railroad operations are commenced under lease, the service cannot be terminated unless some party, either the lessor or the lessee,

obtains abandonment authorization. In the words of this Court, "a certificate is required under §1(18) whether the lessee or the lessor is abandoning operations." *Smith* v. *Hoboken Railroad, Warehouse and Steamship Connecting Co.*, 328 U.S. 123, 130.

Southland also urges that the grantors of the railroad leases were "carriers by railroad" when they granted rights and "as such, they were subject to a 'revived obligation' under Section 1(18) [of the Interstate Commerce Act] * * *" (Br. in Opp. 10), whereas its predecessors were not "natural gas companies" when they leased property to Gulf. However, in the *Chicago & Alton* case discussed on pp. 16-18 of our petition, the grantor entered into the railroad leases *prior* to becoming a certificated carrier following the enactment of the certification and abandonment provisions in the Transportation Act of 1920. Thus, the need to obtain abandonment authorization was—as here—a regulatory consequence imposed on the reversioners by the action of their lessees in obtaining certificates of public convenience and necessity.

3. Southland attempts to minimize the significance of the decision below by noting that the lease in question was a fixed-term lease; whereas today, "[v]irtually all producers of natural gas operate pursuant to leases which continue for a stated primary term *and* 'as long thereafter as oil, gas or other minerals are produced [from the subject acreage] in paying quantities' " (Br. in Opp. 12; footnote omitted). The court below, however, has recently interpreted its decision in this case as applying equally to such life-of-the-well leases. *Pennzoil Producing Company* v. *Federal Power Commission*, C.A. 5, No. 76-1626, *et al.*, decided June 6, 1977.

In that case, producers sought special relief from Commission ceiling rates in order to pay their lessors, grantors of life-of-the-well leases, royalties based on the unregulated "market value" of the leasehold gas. When the producers raised the spectre of cancelled leases and the consequent diversion of gas from the interstate market, the Commission concluded that "[i]f the leases were cancelled and Williams were to undertake to sell the subject gas, Williams would simply assume the obligations of Pennzoil and Shell to continue service to United."[1] The court characterized this Commission view as follows (slip op. 3557):

> Thus the Commission was under the impression that Williams' gas was trapped in the interstate market, whether or not the leases were terminated.

Noting its decision in the present case, the court concluded that "the Commission was acting under the wrong legal premise" (*ibid.*). The court added (*ibid.*):

> It may well be that the "present or future public convenience or necessity" will suggest the propriety of abandoning a fraction of the gas in Williams' property, rather than lose the entire amount from the interstate market.

The court of appeals has thus construed its decision in the present case in a way that would permit any gas sold in interstate commerce pursuant to Commission certificates to be withdrawn from that service without Commission approval upon the occurrence of any subsequent event which terminates the lease. *Pennzoil* thus casts in

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[1]Opinion No. 753, *Pennzoil Producing Co., et al.*, Docket No. R176-8, *et al.*, issued January 30, 1976, p. 9.

bold relief the court's fundamental error here of confining certificated public service obligations to the adventitious terms of private leases.

Respectfully submitted.

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JUNE 1977.